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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

STEPHEN HARRIS,

Plaintiff and Appellant,

v.

DIRECT LEGAL SUPPORT, INC.,

Defendant and Respondent.

E067257

(Super.Ct.No. CIVDS1609008)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez,  
Judge. Affirmed

Monique Harris for Plaintiff and Appellant.

Collins Collins Muir + Stewart, Robert H. Stellwagen, David E. Barker, Christian  
E. Foy Nagy, and Alexandria C. Montes for Defendant and Respondent.

Nearly three and a half years after defaulting in a federal lawsuit, Stephen Harris sued the process server in that action, Direct Legal Support, Inc. (Direct Legal), for unfair business practices and intentional infliction of emotional distress, claiming they failed to serve him and filed false proofs of service. In this appeal, Harris argues the trial court incorrectly granted Direct Legal’s motion to strike his complaint under the anti-SLAPP statute. (Code Civ. Proc., § 425.16, unlabeled statutory citations refer to this code.)<sup>1</sup> We disagree and affirm. Service of process is protected conduct under the anti-SLAPP statute and enjoys civil immunity under the “litigation privilege” codified in Civil Code section 47. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048 (*Rusheen*).)

## I

### FACTS

In 2012, the federal government sued Harris in district court for failure to pay student loans. Counsel for the government hired Direct Legal, a litigation support services company, to serve Harris with the summons and complaint. Thereafter, Direct Legal filed two proofs of service verifying Harris was served on December 11, 2012—one saying service was effectuated by mail, the other by substitute service on a family member at Harris’s Fontana residence. The declaration of due diligence attached to the proof of substitute service says the process server made four attempts on four different days to serve Harris at his residence. For the first three attempts no one answered the

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<sup>1</sup> “SLAPP” is an acronym for strategic lawsuit against public participation. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57, fn. 1.)

door. On the fourth, the process server gave the complaint and summons to Harris's "mother," "Aselia," who said Harris was not home.

Harris did not appear or respond to the complaint, and on January 15, 2013, the clerk entered a default judgment against him for \$6,617.79. Over three years later, in February 2016, Harris moved to set aside the default judgment, arguing Direct Legal never lawfully served him. In support, he submitted the declaration of his wife, Ozelia Harris, who said she was at work when the process server claimed to have spoken with her at the door and given her the pleadings. He also submitted two negative comments about the process server that had been posted on a consumer complaint website. The district court considered the comments inadmissible hearsay and afforded Ozelia's declaration little weight because she had an interest in discharging her husband's debt. The district court denied Harris's motion to set aside default, explaining that even though no evidence suggested he had acted in bad faith or intentionally failed to answer the complaint, he nevertheless had not established a meritorious defense to the lawsuit.

In June 2016, Harris filed the instant lawsuit against Direct Legal. His complaint purports to assert two causes of action—unlawful business practices (Bus. & Prof. Code, § 17200 et seq.) and intentional infliction of emotional distress. The complaint alleges Direct Legal intentionally filed "false statements regarding their service of court process in" the federal lawsuit and engaged in a pattern of fraud by regularly selling similar fraudulent proofs of service to law firms. The complaint also alleges Direct Legal regularly violates Business and Professions Code section 22356.5 by hiring independent

contractor service agents without first ensuring the agents have “obtained the required business licenses”; failing to indicate when their proofs of service have been signed by such agents; and failing to include such agents’ registration numbers and counties of registration on the proofs. Harris sought an injunction prohibiting Direct Legal from filing perjured service declarations and violating Business and Professions Code section 22356.5. He also sought compensatory and punitive damages to be determined at trial.

Direct Legal moved to strike Harris’s complaint as a SLAPP suit. (§ 425.16.) About a week before the hearing on that motion, the district court in the underlying federal lawsuit granted Harris’s motion to reconsider, vacated the default judgment, and gave him 21 days to respond to the government’s complaint.<sup>2</sup> The district court granted the motion based on deposition testimony from Ozelia’s employer saying its records did not indicate she had been absent or had left work early on the day Direct Legal said they completed substitute service.

After briefing and oral argument on the anti-SLAPP motion, the trial court granted the motion and invited Direct Legal to file a separate motion to recover attorney fees and costs. (§ 425.16, subd. (c)(1) [prevailing defendant is “entitled to recover his or her attorney’s fees and costs”].)<sup>3</sup> The trial court rested its ruling on *Rusheen*, where our

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<sup>2</sup> We grant Harris’s request for judicial notice of the district court’s order. (Evid. Code, § 452, subd. (d).)

<sup>3</sup> The fees and cost award is not part of the record, but Direct Legal represents the trial court awarded them \$33,209. Harris does not challenge the reasonableness of this amount.

Supreme Court held a lawsuit arising from allegations of bad service was a SLAPP suit. (*Rusheen, supra*, 37 Cal.4th 1048 at p. 1065.) The trial court explained that the district court’s decision to vacate the default judgment against Harris had no bearing on its analysis because—even if the allegations of bad service in his complaint were true—*Rusheen* says Direct Legal is immune under the litigation privilege. Harris timely appealed. The only issue before us is whether the court correctly struck his complaint as a SLAPP suit.

## II

### ANALYSIS

#### A. *General Principles*

Relevant here, the anti-SLAPP statute makes “subject to a special motion to strike” any cause of action arising from conduct “in furtherance of the [defendant’s] right of petition,” *unless* the court determines the plaintiff has established a “probability” of prevailing on the claim. (§ 425.16, subd. (b)(1).) The court undertakes a two-pronged analysis when deciding whether to dismiss a complaint as a SLAPP suit. First, it determines whether the complaint arises from activity the anti-SLAPP statute protects. Relevant here, the statute protects any “statement or writing made before a . . . judicial proceeding,” as well as “any other conduct in furtherance of the exercise of the constitutional right of petition.” (§ 425.16, subd. (e).) Under the second prong, the court analyzes the plaintiff’s likelihood of success on the merits. “The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second

issue.” (*Kajima Engineering & Const., Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928.) In step two, “the plaintiff ‘must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.’” (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)

The trial court “considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’” (*Equilon Enterprises v. Consumer Cause, Inc., supra*, 29 Cal.4th at p. 67.) We review the trial court’s ruling de novo. (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 727.)

B. *The Court Properly Granted the Anti-SLAPP Motion*

As Direct Legal argued and the trial court correctly agreed, *Rusheen* is dispositive here. In that case, the plaintiff, Rusheen, sued a law firm for abuse of process after default judgment had been entered against him in a previous case. Rusheen alleged, among other things, that the firm had “failed to serve the complaint properly . . . and filed false declarations on the issue of service.” (*Rusheen, supra*, 37 Cal.4th. at p. 1054.) The trial court granted the law firm’s anti-SLAPP motion and the Supreme Court upheld that ruling. (*Id.* at p. 1065.)

As to the first prong, Rusheen’s complaint arose from protected conduct—the “‘defendant’s litigation activity.’” (*Rusheen, supra*, 37 Cal.4th. at p. 1056; see also *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537 [“The anti-SLAPP protection for petitioning activities applies not only to the filing of lawsuits, but

extends to *conduct that relates to such litigation*, including statements made in connection with or in preparation of litigation”], italics added; *Mallard v. Progressive Choice Ins. Co.* (2010) 188 Cal.App.4th 531, 535 [use of subpoenas to conduct discovery is protected by anti-SLAPP statute].)

Regarding prong two, the Court concluded Rusheen could not show a likelihood of success on the merits because the gravamen of his abuse of process claim—allegations of failure to serve and perjured declarations of service—concerned conduct protected by the litigation privilege in Civil Code section 47. (*Rusheen, supra*, 37 Cal.4th. at p. 1062.) The litigation privilege applies to all “communications with “some relation” to judicial proceedings,” rendering the communications “absolutely immune from tort liability.” (*Id.* at p. 1057 [the privilege “is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards”].) The litigation privilege (or more apt, immunity) is relevant to prong two of the anti-SLAPP analysis because it “present[s] a substantial defense a plaintiff must overcome to demonstrate a probability of prevailing.” (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 323 (*Flatley*), citing *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 926-927 [plaintiff failed to satisfy prong two because litigation privilege barred his defamation action]; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783-785 [same].)

The Court concluded the privilege applied to Rusheen’s allegations of perjured declarations of service because the declarations “were communications ‘(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by

law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.” (*Rusheen, supra*, 37 Cal.4th. at p. 1062.) Thus, even if Rusheen’s allegations of bad service *were true*, the defendant law firm could not be liable for such conduct in a separate suit for damages.

The Court explained the privilege, while arguably harsh on the honest plaintiff who has been improperly served, is necessary “[f]or our justice system to function.” (*Rusheen, supra*, 37 Cal.4th. at p. 1064.) The privilege exists “not because we desire to protect the shady practitioner, but because we do not want the honest one to have to be concerned with [subsequent derivative] actions.” (*Ibid.*) “[T]he ‘salutary policy reasons for an absolute [litigation] privilege supersede individual litigants’ interests in recovering damages for injurious publications made during the course of judicial proceedings.” (*Ibid.*) In addition, the Court emphasized plaintiffs like Rusheen alleging bad service had “adequate alternative remedies” at their disposal. (*Ibid.*) Indeed, as the Court noted, Rusheen had already employed one of those remedies by successfully moving to set aside the default judgment in the underlying lawsuit. (*Ibid.*)

*Rusheen’s* holding dictates the outcome of our virtually indistinguishable case. Like with Rusheen’s complaint, the gravamen of Harris’s complaint is that Direct Legal failed to properly serve him then filed a perjured declaration saying they had done so—all of which resulted in a default judgment against him in an underlying lawsuit. Also like Rusheen, Harris was successful in obtaining the alternative remedy of relief from default and a second chance to litigate that underlying lawsuit.

Harris's attempts to distinguish his case from *Rusheen* are unpersuasive. Citing *Flatley*, he argues filing perjured declarations of service is not protected activity because it is illegal under Penal Code sections 118 (perjury) and 134 (preparing false evidence). *Flatley* stands for the proposition that a defendant may not use the anti-SLAPP statute as a shield for conduct "the evidence conclusively establishes" is illegal as a matter of law. (*Flatley, supra*, 39 Cal.4th at p. 320 [the text of a letter defendant attorney had sent plaintiff constituted criminal extortion as a matter of law].) And "illegal" in this context means criminal, not merely violative of a statute. (*Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1654.)

Here, Harris's complaint does not allege Direct Legal's conduct is criminal. Instead, it claims the company's conduct is tortious (intentional infliction of emotional distress) and violates the provisions of the Business and Professions Code applicable to process servers, thereby constituting unfair business practices. Harris's post hoc attempts to recharacterize the alleged conduct as criminal are unavailing. And in any event, even if he had alleged the conduct was criminal, Direct Legal has not admitted to the conduct nor does the record conclusively demonstrate they engaged in the conduct. (Cf. *Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, 705 [anti-SLAPP protection did not apply to defendant's conduct where she *conceded* she had submitted a false police report].)

Next, Harris argues this case is different from *Rusheen* because that case involved allegations of *filing* perjured declarations of service, whereas the gravamen of this case is Direct Legal's *failure* to serve him. We find this argument disingenuous. Harris's

complaint explicitly alleges Direct Legal filed fraudulent proofs of service in district court. The complaint says the company regularly engages—and did engage in the federal lawsuit—in “sewer service” by “failing to serve an alleged debtor and *filing a fraudulent proof of service.*” (Italics added.) Additionally, Harris’s counsel told the court during the SLAPP hearing that “[t]he gravamen of the causes of action is actually that defendant Direct Legal engaged in unlawful debt collection practices [by] *filing false proof of services* [sic] in a debt collection case.” (Italics added.)

The distinction between failure to serve and filing false declarations is immaterial anyway. Assuming Harris’s allegations are true, the cause of the default judgment was not Direct Legal’s failure to serve him, it was their declaration to the court that they had served him when they hadn’t. In other words, the gravamen of Harris’s complaint is a perjured declaration of service. *Rusheen* squarely applies to such a complaint.<sup>4</sup>

Harris’s suit cannot be salvaged by the fact Rusheen asserted a claim of abuse of process whereas he asserted a claim of unfair business practices. As our Supreme Court explained in *Rubin v. Green* (1993) 4 Cal.4th 1187, 1202, the scope of the litigation privilege is broad and its effect is absolute. A plaintiff cannot avoid application of the privilege by using the Business and Professions Code to plead around tort liability. (*Rubin*, at pp. 1202-1203.) “To permit the same communicative acts to be the subject of

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<sup>4</sup> Because Harris’s service allegations are barred by the litigation privilege, we deny his request for judicial notice of various documents purporting to support those allegations (i.e., Harris’s and Ozelia’s declarations, Ozelia’s work schedule, and a printout from [www.usageo.org](http://www.usageo.org) showing the distance from her place of work to the Harris residence).

an injunctive relief proceeding brought by this same plaintiff under the unfair competition statute undermines that immunity. If the policies underlying section 47(b) are sufficiently strong to support an absolute privilege, the resulting immunity should not evaporate merely because the plaintiff discovers a conveniently different label for pleading what is in substance an identical grievance arising from identical conduct as that protected by section 47(b).” (*Id.* at p. 1203.)

As Harris points out, his complaint does contain *other* allegations besides bad service in the underlying lawsuit. The complaint alleges Direct Legal engages in a pattern of fraudulent conduct by selling law firms false proofs of service bearing forged “digital facsimile signatures of its process server agents” and by violating the requirements for independent contractor service agents in Business and Professions Code section 22356.5. But even if we assume those allegations do not also trigger the litigation privilege, Harris has not submitted any evidence to indicate they are true. As a result, the allegations also cannot survive prong two of the anti-SLAPP analysis. (See *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 [under prong two, the plaintiff must submit “a sufficient prima facie showing of facts to sustain a favorable judgment if th[at] evidence . . . is credited”]; see also *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 675 [plaintiff’s burden is similar “to that in opposing a motion for nonsuit or a motion for summary judgment”].)

Finally, Harris argues the litigation privilege does not apply to claims based on violations of the Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.) or the

Rosenthal Fair Debt Collection Practices Act (Civ. Code, § 1788 et seq.). There are two problems with this argument. First of all, Harris’s complaint did not allege a violation of either debt collection statute—it stated only two causes of action, unfair business practices and intentional infliction of emotional distress. After Direct Legal filed their anti-SLAPP motion, Harris sought permission to file a “corrected version” of the complaint which added citations to the state and federal debt collection statutes, but the court refused.

Second, even if Harris *had* pled violations of those statutes and even if we concluded such allegations were not protected by the litigation privilege, Harris would still be unable to show a likelihood of success because the claims would be time barred. The limitations period for both debt collection statutes is one year from the date of the alleged violation. (15 U.S.C. § 1692k(d); Civ. Code, § 1788.17.) Direct Legal filed the proofs of service in December 2012, and thus Harris was well beyond the statute of limitations when he filed the complaint in June 2016.<sup>5</sup>

In short, Harris has sued Direct Legal for engaging in protected litigation conduct and he cannot demonstrate his claims have any likelihood of success, as a matter of law and of fact. We therefore uphold the trial court’s decision to grant the anti-SLAPP motion.

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<sup>5</sup> We deny Harris’s request for judicial notice of a purported printout of Direct Legal’s website and a purported declaration of Direct Legal’s CEO in the underlying federal case. Harris claims these documents tend to show the company is a “‘debt collector’ within the meaning of the [state and federal debt collection statutes].” The point is immaterial given he has not and cannot assert a violation of those statutes.

### III

#### DISPOSITION

We affirm the judgment. Harris shall bear costs on appeal.

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SLOUGH  
J.

We concur:

MILLER  
Acting P. J.

CODRINGTON  
J.